Supreme Court, U.S.
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No. 92-1883

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

VILLA MARINA YACHT HARBOR, INC.,
a/k/a VILLA MARINA YACHT HARBOUR, INC.,
Petitioner,

v.

THE CHASE MANHATTAN BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in a mortgage foreclosure action governed by Puerto Rico law, where the defendant acknowledged the debt and defended on the ground that the lender refused payment to trigger default, the district court improperly ordered the defendant to post payments to the court during the litigation.

2. Whether the court of appeals improperly awarded costs and attorney's fees pursuant to Fed. R. App. P. 38 for the defendant's frivolous interlocutory appeal and petition for mandamus.

LIST OF PARENT CORPORATION AND NONWHOLLY-OWNED SUBSIDIARIES

The only parent company of Respondent is The Chase Manhattan Corporation. The direct and indirect subsidiaries of Respondent (other than wholly-owned subsidiaries) are:

Banco Chase Manhattan, S.A.
Chase Automated Clearing House, Inc.
Chase Manhattan Administracao & Servicios, S.A.
Chase Manhattan Correctora de Seguras Ltda.
Chase Manhattan Financeira, S.A.
Chase Manhattan S.A. Distribuidora de Titulos e Valores Mobiliacios
Chase Paulista Participacoes, S.A.
Corporacion Falcon, Inc.
Corporacion Mexicana de Aviacion, S.A.
Credit Martiniquais
Electronic Payment Service Company (Hong Kong) Ltd.
Ims Imoveis Ltda.
O.A. Venezolano de Pulpa y Papel
Panterhaven Ltd.
Rating Agency Malaysia Berhad
Societe de Developpement Regional Antilles.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
1. District Court Proceedings	2
2. Court of Appeals Decision	6
3. Post-Appeal Proceedings	6
REASONS FOR DENYING THE PETITION	8
CONCLUSION	12

TABLE OF AUTHORITIES

Federal Cases — Page

Bradley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) 11
Hatch v. Reliance Ins. Co., 758 F.2d 409 (9th Cir. 1985) 11
HMG Property Investors v. Parque Industrial Río Cañas, 847 F.2d 908 (1st Cir. 1988) 9
Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980) 11
Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990) 11
United States v. Pérez, 528 F. Supp. 206 (D.P.R. 1981) 10
Zebrowski v. Hanna, 973 F.2d 1001 (1st Cir. 1992) 9

Puerto Rico Cases

Central Vannina v. López, 259 F. 198 (1st Cir. 1919) 10
Finlay v. R. Fabián & Co., 24 P.R.R. 140; 24 P.R. Dec. 152 (1916) 10
Torres v. The District Court, 10 P.R.R. 20; 10 P.R. Dec. 21 (1906) 10

Federal Statutes

12 U.S.C. § 632 2
Fed. R. App. P. 8 6
Fed. R. App. P. 38 11
Fed. R. Civ. P. 12(c) 3
Fed. R. Civ. P. 62 6

Puerto Rico Statutes

Article 1130 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31, § 3180 (1930) 1, 10
Article 1132 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31, § 3182 (1930) 1

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS

Two provisions of the Civil Code of Puerto Rico are relevant to the case. Article 1130 of the Civil Code, P.R. Laws Ann. tit. 31, § 3180 (1930), provides in pertinent part:

> If the creditor to whom payment has been made should refuse to accept it, without reason, the debtor shall remain released from all liability by the consignation of the things due.

Article 1132 of the Civil Code, P.R. Laws Ann. tit. 31, § 3180, provides in pertinent part:

> Consignation shall be made by depositing the things due at the disposal of the judicial authority before whom the tender shall be proven. . . .

STATEMENT OF THE CASE

1. *District Court Proceedings.*

On November 22, 1991, respondent The Chase Manhattan Bank, N.A. ("Chase"),[1] filed a complaint for collection of monies and foreclosure of mortgage against petitioner Villa Marina Yacht Harbor, Inc. ("Villa Marina"). The complaint, brought under 12 U.S.C. § 632 (jurisdiction of U.S. courts in cases involving banking in a dependency or insular possession of the U.S.) and governed by Puerto Rico law, alleged that Villa Marina had defaulted on the mortgage note by failing to make timely payments due on October 1st and November 1st, 1991. The complaint requested appointment of a receiver.

On December 27, 1992, Villa Marina filed a verified opposition to the appointment of a receiver. (Record or "R." 21-28). On January 10, 1992, Villa Marina filed its answer to the complaint (R. 39-43). Villa Marina admitted that it owed Chase the principal and interest pleaded in the complaint but denied that it was in default. (Pet. App., or "A." 40: "it is admitted that VILLA MARINA owes CHASE the principal sum and interest therein pleaded".) Villa Marina also counterclaimed against Chase.

Villa Marina characterized its default to the mortgage note as "manufactured" and "fictitious" and the filing of the complaint as "the culmination of a pattern of harassment and oppression designed to financially crush VILLA MARINA." (R. 42.) Chase allegedly "manufactured" Villa Marina's default by refusing to accept tendered payments for October and November 1991, all in order to force a foreclosure. (R. 31-33.) Villa Marina described how Chase "manufactured" its default as follows:

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[1] For respondent's statement under Rule 29.1, see page ii, *supra*.

> On October 1991, one month after the penalty payment to CHASE of $28,000.00 in attorney's fees, VILLA MARINA was delayed in the payment for that month. CHASE *immediately* filed a foreclosure suit and returned a check for said month that VILLA MARINA had sent to CHASE. VILLA MARINA then sent two (2) checks for the months of October and November and both were returned by CHASE. . . . It is clear that CHASE is looking for every opportunity to create a default in order to deprive FERRER [2] of the marina or of the control of the marina. All of it because of spite.
>
> Thus when the bank filed the complaint only the payment corresponding to the month of October had been slightly delayed a few days. The payment for November was timely received and returned by CHASE. The filing of the complaint together with a petition for receivership because of any such delay in the payment of one month when payment for said month, together with payment for the next month, was tendered to CHASE, is clear evidence of CHASE's spite and bad faith against defendant. (Emphasis in original.) (R. 31-33.)[3]

In view of Villa Marina's admission that it owed the principal and interest claimed in the complaint, on February 10, 1992, Chase moved for a partial judgment on the pleadings under Fed. R. Civ. P. 12(c). Chase also moved to dismiss Villa Marina's counterclaim. A hearing was held before U.S. Magistrate-Judge Arenas on February 28, 1992, to argue, among other things, Chase's dispositive motions.

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[2] Eduardo Ferrer Bolívar is Villa Marina's President and sole stockholder. (R.21.)

[3] The record shows, to the contrary, that Chase had tried to accommodate Villa Marina. Prior to Villa Marina's 1991 default, Villa Marina had missed payments in 1990; after filing a foreclosure action in state court, Chase reinstated the mortgage upon receipt of past-due payments and fees. (R. 23-24.)

On March 12, 1992, the magistrate issued a Report and Recommendation favoring the granting of Chase's dispositive motion. Among other things, the magistrate noted that Villa Marina's defense—Chase's alleged improper rejection of its October and November 1991 payments—was unavailing, because Villa Marina did not consign these payments in court:

> Defendant now raises a number of issues peripheral to the seminal one, that is, the action on the note and the foreclosure of mortgage. However, in relation to the failure to make payments for the months of October and November, 1991, defendant states that the checks were returned by Chase, alleging that the return of the payments shows that Chase is looking for every opportunity to create a default in order to deprive defendant Mr. Ferrer of control of the marina, all because of spite. The law provides for a remedy for this rejection of payment and the record does not disclose that defendant has consigned these two payments, or for that matter any subsequent payments, so that Chase is correct and, regardless of its rejection of two payments, defendant is in default. *One of the payments was late and the other may not have been, but consignment is necessary if a late payment is rejected.* Had defendant consigned the payments, it would have been released from liability for lack of payment. *See* 31 L.P.R.A. § 3180. Regardless of the quagmire of facts and issues which are the subject of the counterclaim, those do not gainsay the precise failure to make the two rejected payments. (Emphasis added.) (R. 93.)

Neither at the hearing before the magistrate nor in its objections to the Report and Recommendation did Villa Marina explain why it had failed to consign the October and November payments allegedly refused by Chase. Likewise, Villa Marina did not later offer to consign the past-due payments or the future monthly mortgage payments during the litigation. In other words, Villa Marina made no attempt to preserve its defense of proper tender

of payment and no offer to preserve the *status quo* during the suit.

Villa Marina did not proffer any evidence that it was unable to deposit such payments in court. To the contrary, Villa Marina's evidence showed that its President and sole stockholder had over $1.0 million in cash available to invest in Villa Marina and that his management of its operations was "outstanding." (R. 27 and 29.) And after the magistrate issued the Report and Recommendation, Villa Marina raised only procedural objections, complaining that it "was not provided with notice, discovery, or a hearing, upon the Magistrate's election to convert plaintiff's Rule 12 motion into a motion for summary judgment." March 27, 1992 Objections to Report and Recommendation, at p. 2.

On May 18, 1992, the district court declined the magistrate's recommendation to enter judgment in favor of Chase and dismiss Villa Marina's counterclaim (A. 19-29). Instead, further litigation was required because of factual disputes. On July 1, 1992, the district court amended its May 18 order to add a paragraph it had "inadvertently omitted." (A. 30.) The amended order directed Villa Marina to deposit in court its past-due mortgage payments, including those allegedly "rejected" by Chase, and to continue making such deposits as they became due during the litigation. (A. 30-31.)

Villa Marina subsequently filed a motion to alter or amend the July 1, 1992 order on the sole ground "that there [was] no provision in the Federal Rules authorizing the Court to order Villa Marina to pay any amount during the pendency of this action." (R. 166.) The motion was denied by the district court on August 5, 1992. (R. 181.) On August 21, 1992, Villa Marina filed its notice of appeal.

Villa Marina did not comply with the order or move for a stay pending appeal, either in the district court

(Fed. R. Civ. P. 62) or in the court of appeals (Fed. R. App. P. 8). On August 31, 1992, Chase moved the district court for an order to show cause why Villa Marina should not be held in contempt. (R. 182-89.) Villa Marina did not respond to Chase's motion or otherwise plead *any* facts excusing its refusal to follow the order of the district court.

2. *The Court of Appeals Decision.*

On February 2, 1993, the court of appeals affirmed the order, concluding that it was "wholly within the administrative powers of the district court and did not constitute an abuse of discretion." (A. 11.) The court stated that it was "at a loss to understand why Villa Marina opposes the order" (A. 12), given its admission that it owed the money and its explicit offer "to post the funds directly to Chase *if* Chase reinstates the mortgage and Villa Marina is allowed to pursue its counterclaim." (A. 13 and R. 166.) In these circumstances, the court concluded, the order "directing [Villa Marina] to deposit the monthly mortgage payments into an interest bearing court account as they become due would not be unusual; in fact it would be routine." (A. 11.) The court added: "The order is a paradigm case of preserving the *status quo* with no harm to either party pending a hearing on the merits." (A. 13.) Finally, "[b]ecause Villa Marina had advanced no plausible reason for this appeal," the court found the appeal "frivolous" and awarded costs and fees. (A. 13.)

3. *Post-Appeal Proceedings.*

On March 11, 1993, after rehearing was denied, the mandate issued. On April 15, 1993, Chase moved for the second time for an order to show cause why Villa Marina should not be held in contempt. By this time, Villa Marina had enjoyed the use of its income derived from the mortgaged property (a marina for luxury yachts) for

more than 1½ years without making a single payment of interest and principal.[4]

On April 23, 1993, and for the first time since entry of the July 1, 1992 order (A. 30-31), Villa Marina moved for a stay—pending the filing of the instant petition. Mischaracterizing the July 1, 1992 order as a judgment, Villa Marina argued that it could not comply because the "RTC [Resolution Trust Corporation] obtained an order of attachment of all the assets of Villa Marina" and its owner "did not have the ability to make the payments." April 23, 1993 Motion to Stay Execution of Judgment, at 2-3. Meanwhile, on that same date, the district court ordered Villa Marina to comply with its July 1, 1992 order by depositing all money due to date, with legal interest, within 12 days after notice. Absent compliance, the court said, judgment would issue for Chase. (A. 32-33.) The order was received by Villa Marina on April 30, 1993. *See* Villa Marina's May 14, 1993 Informative Motion at 1.

Chase responded to Villa Marina's motion for stay on April 29, 1993. Chase apprised the district court of the fact that, contrary to Villa Marina's assertion (the same incorrect assertion made in the Petition at 27-28), its assets were *not* frozen by the RTC and that it had continued to receive rents from boat slips throughout the proceedings. Chase also stated that although it had been assigned certain of Villa Marina's leases, it had not enforced the assignment, precisely so that Villa Marina would have no valid excuse to avoid complying with the district court's order.

On May 7, 1993, the district court denied Villa Marina's motion for stay and, as promised, granted judgment to Chase. (A. 34.) The order, which was not reproduced in the Appendix, states as follows:

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[4] The last monthly payment of principal and interest made by Villa Marina as stipulated in the mortgage note was the one due on September 1, 1991.

> *Order*: On July 1, 1992, the Court entered an amended order, *not* a judgment, requiring defendant to deposit with the Clerk, within 10 days after notice, the past due mortgage payments and all payments that become due during this lawsuit. This is nothing but a motion to reconsider that order and to inform of defendant's non-compliance after nine months after its entry. However, since the Court is entering for the first time today judgment in favor of the plaintiff and there being no objection by them to the stay once judgment was issued, the execution of the Judgment of May 7, 1993 is stayed. (Emphasis in original.)[5]

Villa Marina filed a motion to alter or amend the judgment on May 10, 1993. (Pet. 9.) The district court has not ruled on that motion. An appeal from the judgment has not been taken.

REASONS FOR DENYING THE PETITION

The petition raises three issues: the appealability of the district court's July 1, 1992, order; the propriety of that order; and the propriety of the appellate court's award of costs and fees on appeal. None of these issues remotely warrants this Court's consideration. The petition should therefore be denied.

1. Villa Marina first argues that certiorari should be granted to establish that the July 1, 1992 order was appealable, asserting that "[t]he First Circuit's decision in this case is at odds with the Second Circuit's" holdings that "an order requiring a litigant to place property into custody is appealable as an injunction." (Pet. 12-13.) No appealability issue, however, is properly presented in this case. The First Circuit's decision did not reject Villa Marina's argument for appealability, and the decision cannot conflict with any pro-appealability rulings in the Second Circuit, because the First Circuit reviewed the dis-

[5] Judgment was actually entered on May 10, 1993. (A. 34.)

trict court order on its merits. In fact, the court of appeals *expressly* declined to render any opinion on the appealability question. (A. 11-12.)

Beyond that, it is unclear what Villa Marina seeks. It is hardly in a position to dispute appellate jurisdiction over its own appeal and, indeed, does not do so, arguing instead that the July 1, 1992 order *was* appealable. Yet this Court's acceptance of that view would merely lead to a remand for consideration of the merits of the appeal —which the court of appeals has already done, rejecting Villa Marina's claims. The petition thus requests relief on this issue that could not benefit petitioner.

2. Villa Marina next argues that the entry of the July 1, 1992 order violated its due process rights, alleging lack of notice and an opportunity to be heard as well as inability to pay the ordered sums. (Pet. 13-19.) But Villa Marina does not and cannot point to any part of the First Circuit's decision that announces any legal conclusion contrary to Villa Marina's submissions on the requirements of due process. That is hardly surprising. As the First Circuit explained, the crux of Villa Marina's challenge in the court of appeals was the alleged absence of authority to issue the order (a challenge not pursued in this Court), not any due-process argument. (A. 7.) The lack of any significant legal ruling on the due-process issue raised in the petition is reason enough to deny review.

In any event, Villa Marina's due-process arguments are without merit. As for notice and a hearing, Villa Marina cannot claim either surprise or the denial of a necessary opportunity to contest the order. As the First Circuit explained, the order was one merely "preserving the *status quo* with no harm to either party" and, far from coming as a surprise, "would be routine" in these circumstances. (A. 11-13.) *Zebrowski v. Hanna*, 873 F.2d 1001, 1003-05 (1st Cir. 1992); *HMG Property Investors v. Parque Industrial Río Cañas*, 847 F.2d 908,

915-916 (1st Cir. 1988). Nor was there a factual issue raised warranting a hearing. Villa Marina not only admitted that it owed the sums involved but actually offered to post the funds. (A. 12.) Thus, the First Circuit confessed its inability to "understand why Villa Marina opposes the order," because "Villa Marina has received all it requested." (A. 12-13.) In brief, once the question of *authority* to enter the order was answered, Villa Marina simply had no objection that could justify any hearing.

Villa Marina's claim of unfair process is further undermined by the particular course of proceedings in the case. Villa Marina's own defense—that Chase triggered the default by improperly rejecting mortgage payments—plainly put it on notice that consignment would be required, because consignment is a well-recognized precondition of the defense under Puerto Rico law.[6] This requirement, moreover, hardly passed unnoticed prior to the July 1 order: it was central to the proceedings before and the decision of the magistrate; and although the district court held that the failure to consign was not a basis for *judgment* for Chase, it said nothing to deny the plain requirement of the defense. By the time the district court ordered the consignment, then, Villa Marina had been fully placed on notice and had been afforded ample opportunity to dispute consignment on any factual ground that could require a hearing—which Villa Marina never

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[6] Article 1130 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31 § 3180 (1930); *United States v. Pérez*, 528 F. Supp. 206, 209 (D.P.R. 1981); *Central Vannina v. López*, 259 F. 198, 200 (1st Cir. 1919) (consignation is a mode provided by law to obtain a discharge from the obligation); *Torres v. The District Court*, 10 P.R.R., 20, 22; 10 P.R. Dec. 21, 23 (1906) (consignation pursuant to Article 1144 [Civil Code, 1902, now article 1130, rev. 1930], is equivalent to compliance with the obligation to pay); *Finlay v. R. Fabián & Co.*, 24 P.R.R. 140, 145; 24 P.R. Dec. 152, 156-57 (1916).

did.[7] And *after* entry of the order, Villa Marina received repeated opportunities to contest it *before* it was ever enforced: by the time the July 1992 order was enforced in May 1993 (after 9½ months of non-compliance), Villa Marina not only had filed a motion to alter or amend the order but had received a full appeal. Thus, before any money actually had to be paid over, Villa Marina had full judicial review of any objections it wished to raise. There was no lack of due process.

As for Villa Marina's asserted inability to pay, it is sufficent to note that Villa Marina never raised the possibility that it was unable to comply with the order until after the First Circuit decided the case. To the contrary, not only did its owner boast that it had $1.0 million in cash available to invest in the marina, but Villa Marina explicitly offered to make the payments to Chase. (A. 12.) Of course, to the extent that Villa Marina is complaining about the district court's enforcement of the July 1992 order and entry of judgment on remand from the First Circuit's decision, such complaints are premature: they can have no bearing on the First Circuit decision presented for review in Villa Marina's present petition.

3. Villa Marina finally challenges the *sua sponte* award of costs and fees for the frivolous appeal. (Pet. 23-28.) But Villa Marina neither does nor can point to any other court that has disputed the power to impose sanctions under Fed. R. App. 38 *sua sponte*. *See, e.g., Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562 (5th Cir. 1990). And due process is satisfied by the sanctioned party's opportunity—which Villa Marina had and pursued—to seek rehearing before the sanction order

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[7] In addition, between the May 18, 1992 order of the district court and the July 1st amendment ordering the consignment, Chase expressly raised the consignment issue with the district court, providing additional notice to Villa Marina. (R. 65-70.)

takes effect. *See Bradley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir. 1985); *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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